

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 30, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1830

Cir. Ct. No. 2011CV50

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CFS, LLC,

PETITIONER-APPELLANT,

V.

BAYFIELD COUNTY BOARD OF ADJUSTMENT,

RESPONDENT-RESPONDENT,

COMMITTEE FOR RESPONSIBLE LAND USE,

INTERVENOR-RESPONDENT.

APPEAL from a judgment of the circuit court for Bayfield County:
ROBERT E. EATON, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. CFS, LLC, appeals a judgment affirming the Bayfield County Board of Adjustment's decision denying CFS a conditional use permit. CFS asserts the Board's decision was not supported by substantial evidence and argues its due process rights were violated. We affirm.

BACKGROUND

¶2 CFS seeks to build a private runway and twenty hangars on property in the Town of Russell in Bayfield County. The property was recently rezoned from Agricultural-1 and Forestry-1 to a mixture of Residential-Recreational Business, Agricultural-1, and Commercial. Pursuant to Bayfield County ordinances, CFS may use a portion of the property for an airport by obtaining a conditional use permit.

¶3 On September 22, 2010, CFS applied to the Bayfield County Zoning Committee for a conditional use permit. The Zoning Committee approved the application with conditions.

¶4 In November 2010, the Committee for Responsible Land Use (CFRLU), on behalf of several residents, filed an application for review by the Bayfield County Board of Adjustment. The Board held a public hearing on February 18, 2011, at which both CFS and opposition parties, including CFRLU, presented evidence. The Board then issued a seven-page written decision denying the conditional use permit.

¶5 CFS petitioned the circuit court for certiorari review of the Board's decision. CFRLU was permitted to intervene in support of the Board. The circuit court affirmed the Board's order, concluding that its findings were supported by substantial evidence and were not arbitrary, oppressive, or unreasonable.

DISCUSSION

¶6 A conditional use is a use not permitted of right by zoning regulations, but which may be authorized by a zoning authority. *See Town of Rhine v. Bizzell*, 2008 WI 76, ¶20, 311 Wis. 2d 1, 751 N.W.2d 780. “Conditional uses are for those particular uses that a community recognizes as desirable or necessary but which the community will sanction only in a controlled manner.” *Id.* The decision to grant a conditional use permit is discretionary, and we hesitate to interfere with such local decisions. *Roberts v. Manitowoc Cnty. Bd. of Adj.*, 2006 WI App 169, ¶10, 295 Wis. 2d 522, 721 N.W.2d 499.

¶7 We accord the Board’s decision a presumption of correctness; CFS bears the burden of overcoming that presumption. *See id.* On certiorari review, our inquiry is limited to four issues: (1) whether the Board kept within its jurisdiction; (2) whether the Board proceeded on the correct theory of law; (3) whether the Board acted arbitrarily, oppressively or unreasonably, such that its decision represented the will of the Board rather than its judgment; and (4) whether the evidence was such that the Board could have reasonably reached the determination under review. *See id.*, ¶11. When we review a petition for a writ of certiorari, we review the agency’s decision, not the decision of the circuit court. *Williams v. Housing Auth. of Milwaukee*, 2010 WI App 14, ¶9, 323 Wis. 2d 179, 779 N.W.2d 185.

¶8 Here, as the circuit court recognized, “[t]he real issue in this case is whether the evidence was such that the Board could reasonably make the order in question.” The evidentiary test on certiorari review is the substantial evidence test, under which we determine whether reasonable minds could arrive at the same conclusion the Board reached. *See State ex rel. Ortega v. McCaughtry*, 221

Wis. 2d 376, 386, 585 N.W.2d 640 (Ct. App. 1998). In other words, substantial evidence is evidence of such convincing power that a reasonable person could reach the same decision as the Board. *See Clark v. Waupaca Cnty. Bd. of Adj.*, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994). “If any reasonable view of the evidence would sustain the board’s findings, they are conclusive.” *Id.* at 304-05.

¶9 CFS claims that the Board, and by extension the circuit court, should have disregarded any nonexpert opinion testimony presented at the public hearing. This position is too extreme. Administrative agencies are accorded flexibility in taking evidence and are not bound by rigid and technical evidentiary rules. *See* WIS. STAT. § 901.01¹ (statutory rules of evidence govern only court proceedings); *Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, ¶54, 278 Wis. 2d 111, 692 N.W.2d 572. Thus, we reject CFS’s argument that an individual offering opinion testimony must qualify as an expert witness under WIS. STAT. § 907.02.

¶10 This does not mean an administrative agency may rely on irrelevant or unreliable evidence. As our supreme court explained in *Gehin*, 278 Wis. 2d 111, ¶54, and *Folding Furniture Works v. Wisconsin Labor Relations Board*, 232 Wis. 170, 188-89, 285 N.W. 851 (1939), the evidence must have some probative value. Further, a board may not rely on uncorroborated hearsay evidence that is controverted by in-person testimony. *Gehin*, 278 Wis. 2d 111, ¶4. As far as opinion testimony is concerned, the person testifying need only have

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

“some special knowledge reasonably entitling his opinion to some weight.”
Folding Furniture, 232 Wis. at 188.

¶11 To determine whether the Board’s decision is sufficiently supported, we begin with the ordinance at issue. See *Bizzell*, 311 Wis. 2d 1, ¶21; *Edward Kraemer & Sons, Inc. v. Sauk Cnty. Bd. of Adj.*, 183 Wis. 2d 1, 9, 515 N.W.2d 256 (1994). BAYFIELD COUNTY, WIS., ORDINANCES § 13-1-41(4)a. (2002),² governs conditional use permits and provides twelve criteria for consideration:

The Zoning Committee shall act upon an application at a public meeting of the Committee following the public hearing thereon. In making its decision the committee shall evaluate the effect of the proposed use upon:

1. The maintenance of safe and healthful conditions.
2. The prevention an[d] control of water pollution (including sedimentation), air pollution and noise.
3. Existing topographic, drainage features and vegetative cover on the site.
4. The location of the site with respect to floodplains and floodways of rivers or streams.
5. The erosion potential of the site based upon degree and direction of slope, soil type, and vegetative cover.
6. The location of the site with respect to existing or future access roads.

² By order dated February 8, 2013, this court observed that the record documents in this case are numbered, but the pages within those documents are not sequentially numbered in many instances, making it difficult to find specific cited portions of the record. As such, we declined to strike CFS’s appellate brief for failing to provide record citations and instead citing to a sequentially marked appendix. The ordinance reproduced in the appendix does not include a date, but it appears from Bayfield County’s website that the relevant ordinance was revised in 2002 and 2012. Because the 2012 revisions post-date this case, we assume this case arises under the 2002 version of the ordinance.

7. The amount of liquid wastes to be generated and the adequacy of the proposed waste disposal systems and water supply systems.
8. The demand for public services, such as police and fire protection, solid waste disposal, schools, road maintenance, sewer and water facilities, etc., which would be affected by the proposed use and the adequacy of existing services to meet the increased demand.
9. The prevention of the overcrowding of a natural resource, such as a lake.
10. The potential impact of the proposed use on other lands and land uses in the vicinity and the extent to which it would be compatible or incompatible therewith.
11. The extent to which the proposed use would be compatible or incompatible with the land use plan, if any, of the Town in which the proposed use would be located and the Bayfield County Land Use Plan, if any.
12. The community or general welfare.

¶12 The parties agree some of the ordinance's criteria are not at issue. Specifically, the Board deemed criterion numbers four, relating to floodplains, and nine, relating to natural resource overcrowding, inapplicable. In addition, the Board now concedes that although it considered criterion numbers one, relating to maintenance of safe conditions, and eight, demand for public services, those criteria were not held against CFS. The parties devote significant portions of their brief to an analysis of the evidence supporting or opposing the remaining eight criteria.

¶13 We need not pass upon the evidence supporting each of the remaining eight criteria. Ordinarily, if our decision on one issue disposes of an appeal, we need not review the other issues raised. *Clark*, 186 Wis. 2d at 304. Accordingly, "if we conclude that any one of the board's reasons for denying the variances at issue passes certiorari review, we affirm without commenting on the

board's other reasons.” *Id.* In other words, CFS bears the heavy burden of showing that the Board's decision was wholly unsupported. We conclude the Board's decision regarding criterion numbers three and five, which it considered together, is supported by substantial evidence.³

¶14 The Board's decision regarding criterion numbers three and five is as follows:

The next set of considerations involved will have two criteria considered together and that will be #3[,] the existing topographic and drainage features and vegetative cover on the site[,] and #5[,] the erosion potential to [the] site based upon the degree and direction of slope, soil type and vegetative cover.

- a. This is an issue that this board had a lot of concern about. The most recent proposed site for the airstrip is on high ground and may well have been better than other earlier sites proposed.
- b. However, the construction of the airstrip would still require 212,000 yards of earth to be moved not including material to be used on the runway itself.
- c. The developer has certainly hired capable people to deal with engineering, drainage and wetland issues and their testimony has been considered.
- d. Part of the reason for the hiring of these people by CFS has been the fact that CFS has been cited for wetland violations on the site by the DNR, including illegal grading. They were also notified by the Army [Corps] of Engineers. See exhibits 8 and 10.
- e. During the public hearing, the CFS expert witness assured the board that there was a storm water management plan and the practices and devices would be done in accordance with DNR rules. However, there

³ Accordingly, we need not pass upon the evidence supporting the Board's findings on the ordinance's other criteria, and we need not address some of CFS's remaining arguments involving those criteria, which it combines generally as a due process challenge.

has been some past evidence to indicate that DNR rules were not always complied with by CFS.

- f. In addition, the topography on this site has significant sloping on both sides of the runway, particularly on the side toward the wetlands. There was also some evidence of erodible soils in the area. See exhibit A-52.
- g. There was also evidence from the Bayfield County soil survey that this is an area with some soils that are not suitable for development. See exhibit A-11.
- h. The board has also considered that while the runway would be 60' x 4,000', there was an area to be cleared that would be 120-feet to the center line.
- i. The board has also considered that there are plans for 20 hangars of 60 x 60 feet. This would be 72,000 square feet of additional impervious surface not including taxi ways and access roads.
- j. In addition to the runway, hangars and access roads, there would also be some runway development area that would make the area larger than just the runway itself. See exhibit 52. Mr. Van Natta on behalf of the developer also presented an exhibit showing an object free area of 240-feet beyond either end of the runway. See exhibit 36.

¶15 CFS implicitly concedes there is substantial evidence to support the Board's findings regarding the airport's impacts on existing topography and vegetative cover. It acknowledges that the airport will affect these land traits, though it argues that effect will be minimal. For example, CFS concedes 212,000 yards of earth would be moved, but contends there would be no "negative effect" because "all of the earth moved would stay on the [p]roperty." However, the Board could reasonably find that relocating 212,000 yards of soil to other areas on the site would adversely affect the land's existing topography and vegetative cover.

¶16 CFS also challenges finding j., asserting the Board "failed to consider what is located" in the object-free areas extending 240 feet beyond both

ends of the runway. It claims the area being affected is “minute” and “the vegetation disturbed in this area would primarily be native grasses and very young trees” This argument is improper. The Board obviously rejected CFS’s characterization of the disturbance. The Board conclusively determines what weight to give the evidence before it. *See State ex rel. Washington v. Schwarz*, 2000 WI App 235, ¶17, 239 Wis. 2d 443, 620 N.W.2d 414.

¶17 CFS also challenges the Board’s findings regarding the potential effect on the site’s drainage features. CFS contends it “presented detailed evidence that its intricate storm water management system would preserve drainage patterns, despite sloping or impervious surfaces and, as such, the proposed airstrip would not have a negative impact on drainage.” CFS cites the testimony of its expert, Scott Weyandt, a civil engineer. The Board’s decision acknowledges Weyandt’s testimony, so that testimony requires closer scrutiny.

¶18 Weyandt stated that the site was “quite unique” in its topography and vegetation. He continued, “Because of the unique nature of the water resources there is also a lot of unique, I guess, functions that go with the different areas on the site.” Weyandt observed that flat, sandy areas on the site were recharge areas for storm water, and that steep areas discharged surface storm water down into wetlands and ultimately fed into Pike’s Creek. In addition, Weyandt stated that water would work its way into the ground and slowly move through aquifers. Weyandt explained that good storm water management program tries to mimic this natural cycle and preserve channel stability.

¶19 However, Weyandt stated, “[a]nytime that you develop an area you are going to change it a little bit.” Weyandt observed that the runway would cross six water channels, each of which had to be preserved to maintain the drainage

patterns on the site. Higher peak flows would be a problem, so an elaborate system of drops and plunge pools had to be designed in the culvert system to slow the water down. Weyandt testified that this system still would not address the problem of flow volume; he stated, “It may slow it down, but it may come across over a longer period of time.” Accordingly, a “ditch area” would be created that would “shave off that volume of extra flow that would have gone downstream and infiltrate it into the ground.” Even then, Weyandt testified that the impervious surfaces would produce more pollutants than the undeveloped land. Weyandt’s “preliminary calculations” estimated that infiltration trenches would remove about eighty-five percent of pollutants from water coming off the runway.

¶20 CFS contends that the “detailed water management system” described by Weyandt should have allayed the Board’s concerns that the development would alter the site’s drainage features. We disagree. There is no dispute that the runway construction had the potential to affect what Weyandt described as the area’s “unique” water functions. The Board was not required to grant the permit simply because CFS designed a complex system that would hopefully replicate existing drainage conditions and, by Weyandt’s own admission, would not remove all pollutants.

¶21 Nonetheless, CFS argues that its proposed plans were subject to Department of Natural Resources approval and oversight, and met state regulatory requirements. However, the Board credited evidence that CFS had been cited by the DNR in the past. CFS responds that it has taken “significant steps” to mitigate past wetland damage and restore the area. Again, our sole concern is whether there was substantial evidence to support the Board’s decision. *See Sills v. Walworth Cnty. Land Mgmt. Comm.*, 2002 WI App 111, ¶11, 254 Wis. 2d 538, 648 N.W.2d 878. The weight given to evidence is a matter for the Board to

decide. *Schwarz*, 239 Wis. 2d 443, ¶17. The Board could reasonably rely on CFS’s history of noncompliance with state environmental regulations in reaching its determination. Moreover, CFS does not cite any authority requiring a conditional use permit to be issued merely because an applicant promises to satisfy any applicable government regulations.

¶22 CFS next claims the Board’s concerns regarding erosion are unfounded. The Board credited evidence that there was a significant sloping on both sides of the runway, particularly the wetlands side, and that the area included some erodible soils not suitable for development. CFS claims this evidence is incredible, impermissible lay opinion testimony, and undocumented hearsay.

¶23 The evidence of significant sloping and erodible soils included statements by Kenneth Bro, an environmental consultant. Bro provided several documents, which he represented as his “own drawing using the county land records website.” Bro expressed concern with the slope of the land near the runway, explaining:

[The soil] has to have the ability to support the plane if the plane slides off the paved surface. What happens if it slides off the end? The [Federal Aviation Administration Advisory Guidance] says that for two hundred feet beyond the area of the paved runway you want a slope of no higher than three percent. So that if you go past the runway you are not going to go down into a big ditch. Those kinds of elements somehow were missing.

In addition, Bro maintained that soil erosion would pose construction difficulties.

¶24 CFS does not challenge Bro’s testimony, only the documents he prepared. We observe that Bro’s testimony alone would provide a sufficient basis for the Board’s decision. Nevertheless, CFS incorrectly claims these documents are of “unknown origin.” As Bro explained, the drawings were his own,

developed using information from the county land records website. CFS also claims, without explanation, that these documents are not credible. We decline to review issues supported only by general statements. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶25 Bro's concerns were echoed by Ulf Gafvert, a soil scientist and geographic information specialist, whose affidavit was read at the public hearing.⁴ Gafvert averred that he conducted soil mapping on a portion of the CFS property. According to the soil survey, areas near the runway were labeled "813E" and "805E," which indicated "highly erodible" soils.⁵ Gafvert continued:

[T]he wet conditions in the soils where the proposed landing strip is located will continue to pose a construction and maintenance concern. Subsidence, frost heave and poor soil strength due to saturation will likely contribute to damage to a paved landing strip and other infrastructure. Steps could be taken to remove the water from the system, by way of a French drain, surface ditching and draining, or other measures, but this would adversely impact groundwater movement, and water quality and quantity reaching Pike's Creek, a designated class-one trout stream and Outstanding Water Resource.

On page two of his affidavit, Gafvert concluded that the soil survey "indicates that the CFS property is not well suited for this type of development."

¶26 CFS observes that the record does not include page two of Gafvert's affidavit, and asserts that the Board was not entitled to rely on his affidavit

⁴ Gafvert's affidavit was read by Shari Eggleston, CFRLU's attorney. Eggleston represented that Gafvert submitted his testimony in affidavit form because he was unable to attend the meeting.

⁵ The Board also cites to a pair of maps purportedly developed by the United States Department of Agriculture's Natural Resources Conservation Service. However, these maps do not have a legend or otherwise provide any information about how to read them.

because it constitutes lay opinion and undocumented hearsay. We disagree on both counts.

¶27 Gafvert’s affidavit sets forth sufficient facts showing “some special knowledge reasonably entitling his opinion to some weight.” See *Folding Furniture*, 232 Wis. at 188. Gafvert averred he graduated from Iowa State University in 1986 with a bachelor’s degree in watershed science. Between 1988 and 2002, Gafvert worked as a soil scientist, and performed soil survey work along the south shore of Lake Superior between 1992 and 2002. He stated he has been involved with “local watershed projects” and “conducted training on landform, geology, soils, and wetlands.” Gafvert specifically stated he had conducted soil mapping on the property in question. Accordingly, the Board could reasonably rely on his affidavit.

¶28 We also conclude Gafvert’s affidavit does not constitute impermissible hearsay. As a threshold matter, only page two of his affidavit is missing from the record. The only statement of consequence implicated by this omission is Gafvert’s conclusion that, given the soil readings, the “CFS property is not well suited for this type of development.” There is no dispute that the Board could reasonably rely on the information contained on the first and third pages of Gafvert’s affidavit.

¶29 Even as to Gafvert’s second-page statement, though, CFS fails to cite any evidence controverting Gafvert’s opinion that it would be difficult for CFS to develop this property. In fact, that opinion appears to be confirmed by CFS’s application, which states that the site has an average slope of eleven percent, with a series of relatively flat “benches” between steep drop-offs of up to

thirty percent.⁶ Given this, CFS stated it would employ “[e]xtensive erosion control measures” before, during, and after construction.

¶30 The Board was not required to accept CFS’s assurances that it would prepare satisfactory erosion control procedures at some future time. CFS’s application simply recommends that the Board find that “CFS will provide detailed erosion control, grading, fill and natural resource protection measures prior to construction.” In addition, Weyandt testified that several erosion control plans would have to be developed pursuant to state regulations, and permanent controls, like channel stabilization, would have to be put in place for “the life of the project.” The Board could properly conclude that these aspirational statements did not resolve its concerns about the site’s erosion potential.

¶31 CFS contends the Board should have credited its application’s statement that, “Topography analysis of the proposed location of the runway shows it lies within a relatively flat zone, which is favorable for reducing erosion potential on the site.” This is far from a statement that site erosion was not a concern; indeed, CFS cites no evidence supporting that conclusion. Rather, the statement on which CFS relies essentially acknowledges erosion would be a problem that could be partially mitigated by the location of the runway. Moreover, the Board actually did credit this evidence, stating that the proposed runway site “is on high ground and may well have been better than other earlier sites proposed.”

⁶ Although this document is labeled “Bayfield County Conditional Use Permit Application,” it appears to be simply a document prepared in support of CFS to be presented at the public hearing before the Board.

¶32 In any event, there was sufficient evidence supporting the Board's conclusion regarding the site's erosion potential. We must uphold a decision supported by substantial evidence even if there is also substantial evidence to support the opposite conclusion. *Sills*, 254 Wis. 2d 538, ¶11.

¶33 CFS also suggests, in an extremely brief argument, that the Board proceeded on an incorrect theory of law and violated CFS's right to due process when it stated it had "concern" for criterion numbers three and five. CFS contends the ordinance required the Board to "evaluate the effect of the proposed use," and expressing its conclusion as a "concern" was insufficient. We reject this argument because it elevates form over substance. It is evident from the Board's decision that it determined that the land was ill-suited for CFS's development proposal. Moreover, CFS cites no authority for its argument. Arguments unsupported by references to legal authority will not be considered. *Pettit*, 171 Wis. 2d at 646.

¶34 CFS further asserts that the Board was not impartial because it emphasized CFS's past wetland violations "while wholly disregarding the evidence." An applicant for a conditional use permit is entitled to a fair and impartial hearing, rights that are violated when there is bias or unfairness in fact, or when the risk of bias is impermissibly high. See *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 24-25, 498 N.W.2d 842 (1993). We have already concluded that the CFS's history of noncompliance was a relevant consideration, and that substantial evidence supported the Board's findings on criterion numbers three and five. Accordingly, we reject CFS's claim that the Board "went out of its way to make findings against CFS absent even the flimsiest shred of evidence to support them." Moreover, CFS has not even attempted to show that any Board member prejudged its application or had an impermissible conflict of interest. See *id.* at 26.

¶35 Any argument that the Board acted arbitrarily or capriciously is also without merit. A decision is arbitrary or capricious if it is unreasonable or without a rational basis. *Clark*, 186 Wis. 2d at 306. The Board tailored its analysis to the applicable ordinance and reached conclusions supported by substantial evidence. See *Williams*, 323 Wis. 2d 179, ¶10 (both arbitrary and capricious and evidentiary inquiries on certiorari review require determining whether agency’s decision is founded on sufficient evidence).

¶36 Finally, CFS claims the Board deprived it of due process by failing to timely hold a public hearing and provide CFS with a copy of its decision. The Board responds that the timing of the hearings was a matter of consultation among the various attorneys, and CFS must have received a copy of the Board’s decision because it timely initiated a petition for certiorari review and quoted extensively from the decision before the circuit court. CFS has not responded to this argument. Accordingly, we deem the matter conceded. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded).

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

